

**BEFORE THE STATE OF TENNESSEE BOARD OF FUNERAL DIRECTORS
AND EMBALMERS**

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SECRETARY OF STATE

IN THE MATTER OF:

COLE & GARRETT FUNERAL HOME)
AND CREMATION SERVICES)
182 WEST MAIN STREET)
HENDERSONVILLE, TN 37077)
ESTABLISHMENT LIC. NO 755)

DOCKET NO. 12.21-104857A

STATE'S RESPONSE TO PETITION FOR DECLARATORY ORDER

On September 11, 2009, Cole and Garrett Funeral Home & Crematory (the "Petitioner"), a funeral establishment owned by Stewart Enterprises, Inc., filed a Petition for Declaratory Order with the State Board of Funeral Directors and Embalmers (the "Board") challenging the validity of Rule 0660-06-.02, Tenn. Comp. R. & Regs. on the ground that it exceeds the Board's authority to promulgate rules. The matter is set for hearing on April 13, 2010. For the reasons set forth below, the State submits that Rule 0660-6-.02 does not exceed the Board's authority and should be upheld as a valid rule.

INTRODUCTION

Rule 0660-06-.02 was promulgated by the Board and became effective March 22, 1985 and reads as follows:

(1) No funeral director, embalmer, or funeral establishment shall:

- (a) engage in any unfair or deceptive acts or practices defined in Title 16, Code of Federal Regulations, Part 453; or*
- (b) fail to comply with any preventive requirements specified in Title 16, Code of Federal Regulations, Part 453.*

Subparagraph (a) incorporates by reference the "unfair or deceptive acts or practices" specifically defined in Title 16, Code of Federal Regulations, Part 453. Subparagraph (b) incorporates by reference the "preventive requirements" specified in

Title 16, Code of Federal Regulations, Part 453. Incorporation by reference is a common practice. The following excerpt briefly explains how the practice works:

*A reference is incorporative if its effect is to adopt the standards, requirements, or prohibitions of the referenced material as its own standards, requirements, or prohibitions. An incorporative reference occurs whenever legislation references material outside of itself and indicates expressly or by implication that this material should be treated as if it were fully set forth at that point in the legislation. The requirements of the referenced material are then said to be "incorporated into" or "adopted into" the legislation that adopted them, without the necessity of printing the text verbatim...Incorporation by reference is a feature of legislation at every level and has been used in some interesting ways...Federal statutes adopt state law; municipalities adopt both state law and federal statutes; state statutes adopt state agency regulations, county ordinances, federal statutes, and federal agency regulations; and state regulations adopt state statutes, federal regulations, and federal statutes... With an incorporative reference, a violation of the referenced requirements is a violation of the incorporating legislation, to be enforced under the authority of the entity that adopted the requirements. F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA.L.R. 1201, 1210-1211, 1222 (2008).*

Therefore, when the Board enforces Rule 0660-6-.02, it is not attempting to enforce or interpret federal law as alleged by the Petitioner. Instead, the Board is enforcing its own rule, in its own right.

Furthermore, the practice of incorporation by reference has long been accepted in Tennessee, Stone v. Town of Crossville 187 Tenn. 19, 29, 212 S.W.2d 678, 682 (Tenn.1948), and at least one court has specifically recognized this Board's incorporation of the Funeral Rule. See Craigsmiles v. Giles, 110 F.Supp.2d 658, 663 (E.D. Tenn. 2000).

It is also worth mentioning that § 453.9 of the Funeral Rule makes clear that it does not preempt a state's regulation of the same practices. Section 453.9 reads as follows:

If, upon application to the Commission by an appropriate state agency, the Commission determines that:

- (a) There is a state requirement in effect which applies to any transaction to which this rule applies; and*
- (b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule; then the Commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the state requirement.*

In National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136, 139 (4th Cir. 1989), the court, rejecting NFS's preemption argument, held as follows:

First, we note that the Funeral Rule is a limited regulation focusing on fraudulent sales practices and price disclosure. 47 Fed.Reg. 42260-61 (Sept. 24, 1982). It simply does not attempt a comprehensive regulation of the funeral industry. Furthermore, there is no language in the Funeral Rule that even alludes to an intent to preempt state regulation in the area it does cover. In fact, the Rule expressly states that where a state law is applicable to any transaction that the Rule covers, and that state law affords at least the same level of protection to consumers that federal law provides, the Rule will not be in effect in that state. 16 C.F.R. § 453.9. Thus, not only is the Funeral Rule not a preemptive, pervasive regulation of the funeral industry, it actually encourages concurrent state regulation. National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136, 139 (4th Cir. 1989).

DISCUSSION

The State submits the following reasons for its position that Rule 0660-6-.02 does not exceed the Board's authority:

- 1. The Board is expressly authorized to adopt, promulgate and enforce standards of service and practice by § 62-5-203.**

Tenn. Code Ann. § 62-5-203 reads as follows:

*The board has the power to select from its members a president, and to adopt, promulgate and enforce such rules and regulations for the transaction of its business and the management of its affairs, the **standards of service and practice to be followed in the profession of funeral directing**, and the betterment and promotion of the educational standards of the profession of funeral directors and embalmers in this state, as it may deem expedient, consistent with the laws of the state of Tennessee.* (emphasis added)

The Petitioner does not appear to dispute that the federal provisions adopted by Rule 0660-6-.02 are fairly considered "standards of service and practice to be followed in the professions of funeral directing".

2. Tenn. Code Ann. § 62-5-303 does not limit the Board's rulemaking authority granted by § 62-5-203.

The Petitioner states that § 62-5-203 "should be read together with Tenn. Code Ann. § 62-5-303 which indicates that the Board's purpose in regulating the profession of funeral directing and the operation of funeral establishments is to safeguard life and health and to prevent the spread of contagious diseases, and to improve sanitary conditions and public health generally".

The Petitioner's premise that § 62-5-303 "indicates the Board's purpose in regulating the profession of funeral directing" is incorrect. Section 62-5-303 reads, in pertinent part, as follows:

In order to safeguard life and health and to prevent the spread of contagious diseases, and to improve sanitary conditions and public health generally, it is required that only properly qualified persons shall engage in funeral directing, embalming and operation of a funeral establishment.

This section merely identifies the Legislature's purpose of allowing only properly qualified persons to engage in funeral directing, embalming, or operation of a funeral

establishment. There is nothing in § 62-5-303 that "indicates" that all provisions of the Funeral Directors and Embalmers Act (FDEA) must share this same limited purpose.

3. Tenn. Code Ann. § 62-5-106 does not limit the Board's rulemaking authority granted by § 62-5-203.

Similar to its argument regarding § 62-5-303, the Petitioner argues that "even if the FDEA could be read as authorizing the Board to promulgate regulations designed to protect consumers, Tenn. Comp. R. & Regs. 0660-6-.02 far exceeds the bounds of those provisions within the Act that sound in consumer protection, namely Tenn. Code Ann. § 62-5-106." Section 62-5-106 reads as follows:

Any advertisement by a funeral director or embalmer for the sale of merchandise or services which indicates a specific price shall include an itemized listing of each and every item, procedure, or service and shall show the price of such item. Failure to include the itemized price listing in any advertisement constitutes misrepresentation or fraud in the conduct of the business of the funeral establishment or false and misleading advertising as used in § 62-5-317.

There is nothing in § 62-5-106 to support the Petitioner's argument that the Board's authority to promulgate rules is limited to advertisement standards.

4. Rule 0660-6-.02 does not exceed the bounds intended by the Legislature.

The Petitioner states, "*Clearly, Tenn. Comp. R. & Regs. 0660-6-.02 goes much further than the Legislature ever intended.*" The State disagrees. The Legislature amended § 62-5-317 in 2002 by adding subparagraph (b)(17) which specifically makes violation of any rule promulgated by the Board grounds for suspension, revocation, or refusal to renew a license. At the time of the amendment, Rule 0660-6-.02 had been in effect for seventeen (17) years. It is reasonable to presume that the Legislature did not view Rule 0660-6-.02 as exceeding the Board's rulemaking authority.

Additionally, the FDEA has many other provisions that are designed for consumer protection including, but not limited to, the following sections:

- § 62-5-104 (description of funeral merchandise)
- § 62-5-106 (advertising guidelines)
- § 62-5-108 (display of license on crematory vehicles)
- § 62-5-313(d)(3) (prohibiting charging of a fee for permanent id device)
- § 62-5-317(a)(7) (failure to surrender a body upon expressed order)
- § 62-5-317(b)(1) (misrepresentation or fraud)
- § 62-5-317(b)(2) (false or misleading advertising)
- § 62-5-317(b)(3) (solicitation of dead human bodies)
- § 62-5-317(b)(5) (paying fee for securing business)
- § 62-5-317(b)(7) (accepting rebates from crematory, mausoleum or cemetery)
- § 62-5-317(b)(11) (failure to surrender a body upon expressed order)
- § 62-5-317(b)(12) (making false statement on certificate of death)
- § 62-5-317(b)(14) (false or misleading information regarding embalming)
- § 62-5-317(b)(15) (charging fee for attachment of permanent id device)
- § 62-5-317(b)(17) (failure to comply with any provision or rule)

CONCLUSION

Consumer protection is a valid purpose of the FDEA, Craigsmiles v. Giles, 110 F.Supp.2d 658, 663 (E.D. Tenn. 2000), and the Board's promulgation of Rule 0660-6-.02 is well within its rulemaking authority to adopt, promulgate and enforce standards of service and practice to be followed in the profession of funeral directing. The Petitioner's argument that Rule 0660-6-.02 exceeds the Board's authority is without merit.

Based upon the foregoing reasons, the State submits that the Board should enter an Order upholding the validity of Rule 0660-6-.02.

The State further submits that the costs of this proceeding should be assessed against the Petitioner.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of this Response has been mailed to Rachel C. Nelley, Counsel for Petitioner, P.O. Box 150731, Nashville, TN 37215 this 15th day of December, 2009.

Adrian Chick